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Issue Date: 27 May 2003

CASE NO.: 2002 LHC 1204

OWCP NO.: 06-161154

IN THE MATTER OF

WILLARD G. RICHMOND,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

DECISION AND ORDER GRANTING SECTION 8(f) RELIEF

On March 5, 2003, the parties in this case resolved all issues except the applicability of the second injury fund. Employer submitted exhibits purporting to substantiate such relief, and the Director filed an objection to the applicability of second injury fund to this case on March 5, 2003. The Joint Stipulations of Fact and Law provided:

> 1.The parties agree that an Order incorporating these stipulations as finding of fact shall have the same force and effect as an Order made after a full hearing.
>
> 2. That the documents attached to this stipulation substantiate the stipulations and constitute the evidence on the sole remaining issue of entitlement to second injury fund relief.
>
> 3. That the parties waive any further procedural steps before the Administrative Law Judge after the entry of an Order based on these stipulations and exhibits.
>
> 4.That the parties waive any right to challenge or contest the validity of the Order entered into in accordance with these stipulations. However, all parties retain the right to appeal Your Honor's ruling on the remaining issue of entitlement to the second injury fund relief.

5. That the Claimant, Willard G. Richmond at all times pertinent hereto was subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, since he was employed as an electrician in the construction of navigable vessels at Ingalls Shipbuilding, Inc., which adjoins the navigable waters of the United States in Pascagoula, Mississippi. (EX l; EX 2; EX 3).

6. That on or about July 15, 1994, while in the course and scope of his employment, the Claimant pulled on a wrench and injured his back. (EX 2; EX 3).

7. That the Claimant's average weekly wage at the time of the injury was $671.94. (EX 5; EX 6).

8. That the Claimant came under the care of Drs. John W. Cope, Dr. M. F. Longnecker, Dr. Stephen Barrett, Dr. John McCloskey, Dr. Howard Smith, Dr. Jim Hudson, Dr. Baer Rambach and Dr. Gordon Mead. The Claimant reached maximum medical improvement on February 28, 1995. (EX 15; EX 17; EX 18; EX 19; EX21; EX 23).

9. That as a result of his injuries and medical treatment, the Claimant was temporarily and totally disabled and entitled to benefits at the rate of $447.96 from July 18, 1994 through February 28, 1995, when he reached maximum medical improvement. (EX 18; EX 16).

10. That the Claimant was permanently and totally disabled and entitled to benefits at the rate of $447.96, plus escalation as allowed by law for the period of February 29, 1995, through June 17, 1996. (EX 18; EX 16).

11. That the Employer established the availability of suitable alternative employment paying $185.20 per week as of June 18, 1996, therefore, as of that date the Claimant was permanently and partially disabled and entitled to benefits at the rate of $324.49. (EX 24; EX 10).

12. That the Claimant was no longer able to perform the available suitable alternative employment as of August 14, 2001, and therefore, he has been permanently and totally disabled and entitled to benefits at the rate of $447.96, plus escalation as allowed by law since August 14, 2001.

13. That no penalties or interest are due.

14. That the Employer is entitled to a credit for all compensation heretofore paid and for wages paid at any time during which the Claimant was disabled.

15. That the Employer will be responsible for the Claimant's past and future authorized reasonable and necessary medical treatment causally related to the injury of July 15, 1994, pursuant to § 7 of the Act.

16. That Counsel for Claimant shall be entitled to a reasonable and necessary attorney fee payable by the employer, pursuant to §28 of the Act for the successful prosecution of this claim in an amount substantiated by the attached fee petition not to exceed TEN THOUSAND AND NO/100 DOLLARS ($10,000.00).

17. That it is the intention of the parties that this stipulation resolves all issues as between the Employer and the Claimant. It leaves applicability of the second injury fund as the sole issue remaining for determination by the Administrative Law Judge, and that issue is to be determined based on the records attached in lieu of a full hearing on the merits.

A. Exhibits in Support of Section 8(f) Relief

(1) Deposition of Claimant

Claimant testified that in 1975 he was injured working as a electrician in the New Orleans area for Gulf Best. (EX 25, p. 19). The injury occurred when Claimant was holding onto a chain fall, and the end was dropped over the side of the ship. *Id*. at 20. Claimant suffered an injury to his wrist, he was out of work for a few years, but he could not remember being assigned any permanent restrictions or having an impairment rating. *Id*. at 20-21. Claimant related that he continued to experience pain in his left wrist. *Id*. at 21.

Also, Claimant testified that prior to his workplace injury on July 15, 1994, he had experienced other back injuries. (EX 25, p. 49). While working for Employer, Claimant fell down some steps on a wet dock. *Id*. Claimant's only treatment for that injury was a few pills and he never saw a physician outside of the company infirmary. *Id*. In 1993, Claimant suffered from a right shoulder injury and he treated with Dr. Longnecker who wanted to perform surgery for torn ligaments and a damaged rotator cuff. *Id*. at 50. After a second opinion, however, surgery was not approved. *Id*. Claimant stated that he did not lose any time at work because of that injury, and he did not file any claim for that injury until after he hurt his back on July 15, 1994. *Id*. at 51. Claimant had no documented limitations to his shoulder prior to hurting his back. *Id*. at 52. Also, Claimant testified that he injured his left shoulder after July 15, 1994 when his leg gave way and he grabbed a door knob for support. (EX 26, p. 20).

Additionally, Claimant testified that he had a bilateral hernia prior to 1994, and that he suffered that hernia while working for Employer. (EX 25, p. 54). Claimant had some head lacerations in a plane crash from 1969. *Id*. Also, in 1991, Claimant had an elbow injury, but he did not receive any compensation for that injury and he did not lose any work time. *Id*. at 56-57. Only after he was off from work with his back injury did Claimant undergo surgery for his elbow. *Id*. at

57. Claimant could not remember having any other injuries prior to July 15, 1994. *Id*. at 53. Claimant testified that his elbow, shoulder and back injuries occurred in three separate incidents. *Id*. at 64.

(2) Employer's Personnel Records

In Claimant's application for employment, dated December 6, 1990, he disclosed that he had a bilateral hernia. (EX 1, p. 4). On July 15, 1994, Claimant sustained a workplace injury to his back when he pulled on a wrench. (EX 2, p. 1). At the time of his injury, Claimant was earning $13.55 per hour, and for the pay periods ending on July 18, 1993 through July 10, 1994, he earned $33,760.10. (EX 5, p. 1-2). On June 18, 1996, Employer suspended part of Claimant's compensation based on a labor market survey purporting to demonstrate suitable alternative employment, and Employer timely filed a notice of controversion. (EX 10, p. 4-5).

On January 18, 1996, Carrier wrote to Claimant informing him that Melinda Wiley had located employment consistent with his physical restrictions and that Claimant should return to work on January 29, 1996. (EX 20, p. 1). When Claimant returned to work, Ms. Wiley was not able to place Claimant in a position consistent with his restrictions. (EX 25, p. 47-48).

(3) Employer's First Petition for Section 8(f) Relief

Employer's first petition for Section 8(f) relief, filed in June 1997, stated that Claimant suffered from chronic low back syndrome, multiple level degenerative disc disease, and a small herniation at L3-4, for which Dr. McCloskey assessed a ten percent permanent partial impairment, and assigned a maximum medical improvement date of February 28, 1995. (EX 11, p. 3). Employer alleged previous injuries consisting of a head injury in a plane crash in 1969, a February 15, 1991 hand injury, and following a diagnosis of ulnar neuropraxia, Claimant underwent surgery to his left elbow which resulted in a five percent permanent impairment as of July 10, 1995. *Id*. at 4. Additionally, in August 1992, Claimant twisted his back, and in November 1993, Claimant suffered a shoulder strain which necessitated surgery resulting in a seventeen percent impairment to his right upper extremity and a ten percent whole body impairment. *Id*.

Dr. McCloskey opined that Claimant's shoulder and ulnar problems, combined with his low back problems, made Claimant materially and substantially more disabled than his 1994 back injury alone. (EX 11, p. 5). Dr. Rambach also agreed that Claimant's combined injuries made him more disabled than if he had just suffered a back injury at work. *Id*.

(4) Medical Records Establishing Claimant's Pre-Existing Conditions

On February 18, 1991, Claimant complained of numbness in his fingers and he received a cortisone shot in his left arm and elbow. (EX 15, p. 1). On February 25, 1991, Claimant was assessed as having ulnar neurapraxia, and he was referred to Dr. Cope, an orthopaedist. *Id*. On February 25, 1991, Dr. Cope opined that Claimant may have some permanent problems. *Id*. at 2.

By May 3, 1991, Dr. Cope reported that EMG/NCVs confirmed ulnar compression at the elbow, but Claimant elected to live with the condition rather than have ulnar nerve transposition. *Id*. at 4. Dr. Cope further advised Carrier that Claimant may require the surgery in the future. *Id*. On October 7, 1991, Dr. Cope again recommended to Claimant that he undergo the procedure, and Dr. Cope opined that the surgery would likely result in a ten percent impairment of the arm. *Id*. at 5. Dr. Cope repeated his recommendation for surgery on September 28, 1992, but October electrical studies showed some improvement in ulnar function. *Id*. at 9. After repeating electrical studies in July 1993, Dr. Cope opined that it would be reasonable to acquiesce in Claimant's desire not to have surgery in the near future, but surgery at some time would be necessary. *Id*. at 11. On July 11, 1994, Claimant consented to have surgery. *Id*. Dr. Cope performed the surgery in March, 1995. *Id*. at 25. On July 7, 1995, Dr. Cope stated that Claimant had reached maximum medical improvement with regard to his elbow, and Claimant suffered from a five percent permanent impairment of the arm. *Id*. at 28.

On August 11, 1992, Claimant complained of low back pain and spasm, for which he was prescribed medication, but Claimant returned to work shortly thereafter. (EX 15, p. 7-8).

On April 6, 1994, Claimant reported right shoulder pain after spending two months crawling on scaffolding. (EX 15, p. 13). On April 7, 1994, Claimant was noted to have symptoms consistent with tendonitis in his right shoulder. *Id*. On May 11, 1994, Claimant was referred to Dr. Longnecker. *Id*. at 14. A June 3, 1994 MRI revealed that Claimant was either suffering from supraspinalous tendonitis or a rotator cuff tear to his right shoulder. *Id*. at 16. On June 10, 1994, Dr. Longnecker recommended acromioplasty repair. *Id*. at 17. In a second opinion evaluation, Dr. Hudson reported that surgery was not necessary as of August 18, 1995, and he recommended additional physical therapy with shoulder injections. *Id*. at 18. Based on his shoulder injury alone, Dr. Hudson opined that Claimant could work at a limited capacity with a limited amount of lifting and overhead work. *Id*.

(5) Medical Records of Dr. Steven Barrett

On July 21, 1994, Claimant presented to Dr. Barrett regarding back pain caused by a July 15, 1994 workplace accident. (EX 17, p. 1). Dr. Barrett ordered an x-rays of Claimant's lumbar spine which only revealed minimal degenerative changes. *Id*. at 2. After an initial course of physical therapy, Dr. Barrett referred Claimant to Dr. McCloskey on August 18, 1994, due to persistent pain. *Id*. at 3.

(6) Medical Records of Dr. McCloskey

Dr. McCloskey, a neurosurgeon, first evaluated Claimant on August 30, 1994, for disabling low back pain and intractable headaches. (EX 18, p. 9). Dr. McCloskey's impression was post-traumatic low back syndrome, post-traumatic neck pain and headache, and incidental left ulnar neuritis. *Id*. at 10. Dr. McCloskey also noted that Claimant had occasional problems over the years with his back and with headaches, but his past experiences were nothing like his current difficulty.

Id. A September 12, 1994 CT scan of the head and lumbar spine returned normal results, but an MRI of the lumbar spine demonstrated: minimal herniation at L1, which did not compromise the neural canal or foramina; an uncomplicated moderate Schmorl's node at L3; and a bulging L5 disc. *Id*. at 11. Dr. McCloskey opined the MRI was indicative of mild degenerative changes. *Id*. at 12.

In a physical therapy report, dated November 15, 1994, Claimant's therapist noted that Claimant had some improvement, but Claimant reported his symptoms had reached a plateau. (EX 18, p. 17). On December 14, 1994, Dr. McCloskey admitted Claimant for a myelogram, which revealed: small ventral extradural defects at L1, L3, and C3-4. *Id*. at 18, 22. A post-myelogram CT scan demonstrated: minimal disc herniation at C4-5; disc herniation at L3-4; and disc bulging v. herniation at L4 and L5. *Id*. at 22. On December 21, 1994, Dr. McCloskey opined that Claimant's disc problems did not require surgery, and he requested a second opinion on Claimant's medical treatment. *Id*. at 26. Dr. McCloskey also stated that Claimant's shoulder and ulnar problems were not related to the current back injury. *Id*.

In a February 14, 1995 functional capacity evaluation, Claimant gave a maximum effort and was not noted to engage in any symptom magnification. (EX 18, p. 27). Claimant demonstrated the ability to work in a sedentary capacity with maximum safe lifting ranging from ten to twenty pounds. *Id*. Claimant's prognosis was poor. *Id*. Claimant could never crawl, balance, or climb ladders; and he could occasionally bend, squat, kneel, reach, sit, stand, walk, use hand and foot controls, and climb stairs. *Id*. at 28. Reviewing the results of the functional capacity evaluation, Dr. McCloskey opined that Claimant could return to work on February 28, 1995, he had reached maximum medical improvement on February 28, 1995, and he had a permanent partial impairment of ten percent to the body as a whole. *Id*. at 30. Dr. McCloskey also set Claimant's permanent work restrictions, which consisted of: no lifting over ten pounds, no climbing of ladders, no crawling or beam balancing, and Claimant was able to sit, stand, and walk around. *Id*. at 31.

In a June 16, 1996, letter to Carrier, Dr. McCloskey stated that Claimant's shoulder and ulnar nerve problems, combined with his low back problems, made Claimant "materially and substantially" more disabled than what Claimant would have been due to his 1994 back injury alone. (EX 18, p. 41). Again, on January 15, 2003, Dr. McCloskey stated that Claimant would normally be relegated to using his upper body with his work restrictions, but due to his pre-existing elbow and shoulder injuries, Claimant could not work overhead or perform repetitive work with his arms and hands. *Id*. at 42. Dr. McCloskey summarized:

> I do not think there is any question that his pre-existing injuries to his upper extremities would combine with and contribute to the effects of his injury of July 15, 1994, to render him materially and substantially more disabled that he would have been as a result of the injury of July 15, 1994 alone.

(EX 18, p. 42).

(7) Medical Records of Dr. Baer I. Rambach

On March 28, 1996, Claimant presented to Dr. Rambach, an orthopaedist, who opined that Claimant suffered from chronic lumbar syndrome, a recent compression fracture, and a possible right rotator cuff injury. (EX 21, p. 6). On May 9, 1996, Dr. Rambach stated that Claimant's ulnar nerve above his left elbow may need re-exploration because scar tissue may have formed at the site of the transfer. *Id*. at 8. Dr. Rambach also recommended that Claimant not engage in any physical work of a heavy, medium or light nature, but Claimant would be able to work in a sedentary classification where he could alternate sitting, standing, and resting. *Id*. X-rays taken on July 11, 1996, demonstrated a compression fracture of the third lumbar vertebrae that was healed, but with a loss of twenty percent of the vertebral height. *Id*. at 10. Dr. Rambach opined that Claimant had reached maximum medical improvement from his July 15, 1994 injury, and Claimant would be limited to performing only light, semi-sedentary, or sedentary work. *Id*.

In a December 12, 1996 evaluation, Dr. Rambach stated that Claimant had an impairment of four percent to the right upper extremity due to limits in abduction. (EX 21, p. 14). Claimant had a seven percent impairment of flexion, a one percent impairment in external rotation, and an eight percent impairment to internal rotation. *Id*. Combined, Claimant had a seventeen percent physical impairment to his right upper extremity. *Id*. Based on Claimant's lumbar condition, including his compression fracture, Claimant had a sixteen percent whole person impairment rating. *Id*. at 15. Combining Claimant's shoulder and lumbar injuries equated to a twenty-five percent impairment to the body as a whole. *Id*. On January 27, 1997, Dr. Rambach wrote that he agreed with Dr. McCloskey and he opined:

> I do believe that the pre-existing left elbow, right shoulder and lumbar injuries, coupled with the accident on July 15, 1994, did have a definite increase in this patient's overall disability to the point where he is no longer able to work.
>
> I do agree with Dr. McCloskey who indicated that Mr. Richmond's pre-existing injuries did combine with the July 15, 1994 injury "to make the patient materially and substantially more disabled that he would have been from the July 15, 1994 injury alone."

(EX 21, p. 16).

Claimant also treated with Dr. Rambach on August 15, 2001, and in a December 26, 2001 note to Claimant's attorney, Dr. Rambach stated that Claimant would not be able to engage in any of the employment identified by Employer's vocational expert as of his August 15th evaluation. (EX 21, p. 54). Dr. Rambach further opined that Claimant would be able to engage in work of a "very light nature." *Id*. The two jobs Dr. Rambach disapproved of were an optical assistant, where lifting was under ten pounds, and a telemarketer position which entailed scheduling appointments with insurance agents. (EX 24, p. 7). On September 23, 2002, Dr. Rambach opined that Claimant was

"totally physically impaired from being able to engage in any type of physical work for wages." *Id*. at 57.

B. Entitlement to Section 8(f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the subsequent injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments. 33U.S.C. § 908(f) (2002).

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

B(1) Claimant's Pre-Existing Injuries

Claimant suffered a series of injuries prior to his July 15, 1994 workplace accident:

1. A 1969 head injury, as a result of an airplane crash;

2. A 1975 wrist injury, which occurred in a chain fall accident;

3. A bilateral hernia, suffered prior to December 1990;

4. A February, 1991, injury to his elbow, which resulted in a March, 1995, surgical operation with a date of maximum medical improvement of July 7, 1995, and a five percent permanent partial impairment to the arm;

5. An August, 1992, back injury; and

6. A 1993-94 shoulder injury resulting in work restrictions set on August 18, 1995 of limited lifting and overhead work, and an assessed seventeen percent impairment to the right upper extremity on December 12, 1996.

Of the above injuries, the head lacerations sustained in an airplane crash did not result in any permanent partial impairment. (EX 25, p. 54). Likewise, there was never any assessed permanent partial impairment for Claimant's 1975 wrist injury, his bilateral hernia, or his 1992 back injury. *Id*. at 56-57; (EX 1, p. 4; EX 15, p. 7-8). In fact, Claimant did not suffer from any documented, permanent, partial impairment prior to his July 15, 1994 workplace accident. The February, 1991, injury to his elbow, did not result in any lost time from work or in any contemporaneous restrictions. (EX 25, p. 56-57). Dr. Cope only stated that he recommended surgery and that any future surgery could result in a ten percent permanent partial impairment of the arm. (EX 15, p. 5). Claimant never worked with any restrictions to his arm, until he eventually underwent surgery in March, 1995, well after his July 15, 1994 back injury. (EX 15, p. 25). Likewise, Claimant's shoulder injury, which he testified occurred in 1993, did not result in any work impairments or lost work time prior to his July 15, 1994 back injury, (EX 25, p. 50-51), and it was not until August 18, 1995, that Dr. Hudson assigned Claimant work restrictions based only on his shoulder injury. (EX 15, p. 18). Accordingly, Claimant had no existing, documented, permanent, partial disability[1] prior to his workplace accident on July 15, 1994.

B(2) Manifest & Pre-Existing Permanent Impairments

To show entitlement to Section 8(f) relief, the employer must demonstrated the pre-existing permanent impairments were manifested to the employer. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). To meet this requirement, the employer must have actual knowledge of the pre-existing condition, or there must be medical records in existence from which the condition was objectively determinable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 147 (1997), citing *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Medical records need not indicate the severity of precise nature of the pre-existing conditions, and the medical records will satisfy the "manifest" requirement if they contain "sufficient and unambiguous information regarding the existence of a serious lasting physical problem." *Id*. citing *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1988).

[1] This is not to say that Claimant did not suffer from any physical impairments. The fact that Claimant could continue to work in his former job only means that he did not suffer from any disability. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977) (stating that a condition need not be economically disabling in order to constitute a pre-existing permanent partial disability under Section 8(f)).

The First Circuit in *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 83 (1st Cir. 1992) upheld a determination by the Board that a pre-existing permanent partial impairment need not be "permanent" at the time of the second injury to grant an employer Section 8(f) relief as long as the pre-existing condition was of a serious and lasting nature. The claimant, Lockheart, injured his back on March 27, 1998, was diagnosed by the employer's physician as having muscle spasm, was returned to light duty work on April 25, and he continued to complain of pain. *Id*. at 76. On May 1, 1978, Lockheart experienced a second back injury and he suffered a ruptured disc. *Id*. In addressing the Director's argument at Lockheart's March 27, 1978 injury was not permanent at the time of his May 1, 1978 injury, the First Circuit explained:

> The Director proposes that we adopt the first ALJ's holding that the manifest requirement is not fulfilled when an employer does not know with absolute certainty that the disability is permanent. If we adopted this position, an employer would be required to know without a doubt, or have medical records conclusively indicating, that the disability was permanent. Such a rule would severely restrict the coverage of Section 8(f) and conflict with the purposes of the manifest requirement and of Section 8(f) itself. To deny limited liability to all employers who, at the early stage of a disabling injury, are not 100% certain that it will be permanent would exclude even those employers who have a strong incentive to discriminate. For example, under the Director's proposed rule an employer who knew that a worker had sustained a disabling knee injury and had substantial, but not yet conclusive, information that the knee condition was permanent would fail to meet the manifest requirement and thus be ineligible for Section 8(f) relief. However, the uncertain employer would have had as much a financial incentive to fire the worker with the weak knee as the employer who knew conclusively that the knee was permanently weakened. Awarding limited liability under Section 8(f) to the latter but denying it to the former would severely restrict the availability of Section 8(f) relief in a manner inconsistent with the purposes of the manifest requirement and Section 8(f). In many circumstances, it is impossible until years have passed to definitively determine whether an injury has caused permanent damage.

Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 83 (1st Cir. 1992) (citations omitted).

Here, Claimant's 1991 elbow injury, and 1993 shoulder injury, were manifest to Employer through the medical records from Employer's infirmary and from referred physicians. Specifically, Dr. Cope advised Carrier in May, and October, 1991, that Claimant would require surgery for his elbow condition at some point in the future, and after the surgery Claimant would likely have a ten percent impairment to the arm. (EX 15, p. 4-5). Likewise, Carrier was aware that Dr. Longnecker had recommended surgery to repair Claimant's shoulder on June 10, 1994, shortly before Claimant's July 15, 1994 workplace injury to his low back. *Id*. at 17. Thus, Claimant's 1991 elbow injury, and 1993 shoulder injury, were manifested to Employer through Claimant's medical records which were provided to Carrier. The fact that Claimant had two recommendations for surgery indicated that Claimant had a serious, lasting, physical problem.

B(3) Extent of Claimant's Subsequent Injury Alone

As a result of Claimant's July 15, 1994 workplace accident, he was temporarily totally disabled from July 18, 1994 to February 28, 1995, when he reached maximum medical improvement. (Joint Stipulations). Claimant was permanently and totally disabled from February 29, 1995 to June 17, 1996, at which time Employer demonstrated suitable alternative employment, and Claimant became permanently totally disabled on August 14, 2001, because he was no longer deemed fit to work in the alternative employment. (Joint Stipulations). Based on his 1994 back injury alone, Dr. McCloskey, reviewing the February, 1994, functional capacity evaluation, set the following permanent restrictions on February 28, 1995: no lifting over ten pounds, no climbing of ladders, no crawling or beam balancing, and Claimant was able to sit, stand, and walk around. (EX 18, p. 31). Claimant had a permanent partial impairment of ten percent to the body as a whole. *Id*. at 30.

B(3) The Relationship Between Claimant's Existing Permanent Partial Disability and Subsequent Injury

As noted *supra*, Employer was aware that Claimant suffered from elbow and shoulder injuries of a serious and lasting nature prior to his July 15, 1994 back injury. Claimant's pre-existing conditions did not aggravate his back problem, rather, Claimant had distinct pre-existing injuries to his elbow and shoulder. Claimant underwent surgery for his elbow condition in March, 1995, and that injury never reached permanency until July 7, 1995, when he was assessed as having a five percent permanent impairment. On the other hand, Claimant never had surgery on his shoulder and his shoulder condition was unchanged when Dr. Rambach calculated Claimant's upper extremity physical impairment ratings in December 1996.

B(4) Determining Whether Claimant's Current Permanent Disability is Due Solely to the Subsequent Injury or Whether the Pre-Existing Injuries Materially and Substantially Contributed to Claimant's Current Disability.

To establish the contribution element Employer must show by substantial evidence that Claimant's ultimate permanent disability was not due solely to the work injury, but in fact was materially and substantially greater due to Claimant's pre-existing disability. 33 U.S.C. § 908 (f)(1) (2002); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303 (5th Cir. 1997). Employer must offer some proof of the extent of the permanent partial disability had the pre-existing injury never existed so that the Administrative Law Judge may determine if Claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *Id.* at 308. The Board further noted that the Administrative Law Judge may resolve the inquiry "by inferences based on such factors as perceived severity of pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them. *Id.* at 307; *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 391 (5th Cir. 1997).

In *Ceres*, 118 F.3d at 391, the Fifth Circuit specifically declined "to adopt a rule that would require a rote recitation of the applicable legal standard" under Section 8(f). Rather, "the fact finder's inquiry must of necessity be resolved by inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the relationship between them." *Id*. In *Ceres*, the court upheld the ALJ's determination that the claimant's, Allred's, "pre-existing disabilities, combined with his employment injury to produce a greater disability than would have occurred in the absence of the pre-existing disabilities." *Id*. at 390. Allred had suffered relatively minor injuries to his shoulder and neck, *id*. at 389, that overlaid a pre-existing back condition, hypertension, diabetes and severe arm, elbow, neck and shoulder injuries. *Id*. at 390-91 n.2. A physician opined that Allred's current impairment was mainly a result of his pre-existing condition which "'superimposed on and combined with' the employment injury." *Id*.

After reviewing the entire record, I find that Claimant's 1991 elbow injury, and 1993 shoulder injury, allowed Claimant to continue his normal job duties until he suffered his July 15, 1994 back injury. Claimant's July 15, 1994 back injury did not, by itself, contribute solely to Claimant's current permanent total disability. Rather, based on Claimant's July 15, 1994 back injury alone, I find that Claimant was capable of sedentary to light work as explained by Dr. McCloskey on February 28, 1995. (EX 18, p. 30-31). Also, Claimant was capable of engaging in suitable alternative employment as established by Employer. Only as a result of Claimant's 1991 elbow injury, with its eventual surgery, and the1993 shoulder injury, did Claimant become more disabled than he would have been based on the back injury alone. Both Drs. McCloskey and Rambach concurred that the three injuries combined definitely increased Claimant's overall disability rating. (EX 18, p. 42; EX 21, p. 16).

More specifically, the February 14, 1995 functional capacity evaluation illustrated some of the restrictions in Claimant's elbow and shoulder by revealing that Claimant had muscle grade within normal limits in his elbow, and a muscle grade withing seventy-five percent of normal in the shoulders. (EX 18, p. 29). Likewise, Claimant's upper extremity flexibility was tested as within seventy-five percent of normal. *Id*. Also, when Dr. Rambach assessed Claimant's permanent partial disabilities on December,1996, he assessed a sixteen percent whole person impairment rating based only on Claimant's lumbar condition, and when he added Claimant's arm and shoulder impairments, the whole body disability rating increased to twenty-five percent. (EX 21, p. 15). Based on Claimant's uncontradicted testimony, his upper extremity problems deteriorated to a point such that Claimant testified on January 10, 2003, that he did not raise his elbows above his shoulder. (EX 26, p. 28). When Dr. Rambach made his assessment that no identified job was suitable for Claimant as of August 14, 2001, his opinion was based in part on his July 26, 2001 examination, where he detailed restrictions to Claimant's upper extremities. (EX 21, p. 43-46, 51-54).

Accordingly, prior to his July 15, 1994 workplace injury, Claimant was capable of performing his normal job. Based on Claimant's July 14, 1994 back injury alone, Claimant was capable of sedentary to light work. On August 14, 2001, the combination of Claimant's July 15, 1994 back injury, and his pre-existing injuries to his elbow and shoulder, which deteriorated over time to such an extent that Claimant could not raise his elbow above his shoulder, resulted in permanent total

disability, which is materially and substantially greater than the sedentary to light disability attributable to Claimant's back injury alone.

C. Conclusion

Therefore, while Claimant had no existing, documented, permanent, partial disability prior to his July 15, 1994 workplace accident, Claimant did have undocumented physical impairments to his elbow and shoulder, and employer had medical records indicating that both the elbow and shoulder conditions were of a serious and lasting nature prior to Claimant's July 15, 1994 workplace accident. Based on Claimant's July 15, 1994 back injury alone, Claimant could work provided that he did not lift over ten pounds, and he did not climb ladders, crawl, or beam balance. These restrictions were distinct from Claimant's elbow and shoulder impairments, and Claimant was able to work in alternative employment from June 18, 1996 to August 14, 2001. On August 14, 2001, the combination of Claimant's deteriorating elbow and shoulder injuries with his back injury, led to Rambach to disapprove of specific sedentary occupations for Claimant, rendering him totally and permanently disabled, and the combination of his three injuries rendered Claimant materially and substantially more disabled than he would have been based on his July 14, 1994 injury alone. Based on the above facts, I find that Employer is entitled to Section 8(f) relief to take effect 104 weeks after August 14, 2001.

ORDER

It is hereby **ORDERED:**

1. The joint Stipulations submitted by Claimant and Employer are accepted.

2. Employer is entitled to Section 8(f) relief commencing 104 weeks after August 14, 2001.

A

CLEMENT J. KENNINGTON
Administrative Law Judge